

APPEAL NO. 040094
FILED FEBRUARY 25, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 15, 2003. The hearing officer determined that the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting in accordance with Sections 409.021 and 409.022; that the respondent's (claimant) compensable injury includes peripapillary subretinal neovascular membrane and infarct in the right eye; and that the claimant had disability beginning December 4, 2002, and continuing through July 28, 2003. The carrier appeals the adverse determinations. The claimant responds, urging affirmance.

DECISION

Affirmed, as reformed.

In setting forth dates in Findings of Fact Nos. 9, 11, and 12, the hearing officer incorrectly wrote down "2003," when the correct year is "2002." We reform those findings to conform to the evidence.

The claimant sustained an injury on _____, when he was hit in the right eye by something thrown by a student. He was examined by Dr. W on September 12, 2002, and medical records contain a reference to "hemorrhagic" and "possible neovascular net" in the macula area of the right eye. Dr. W referred the claimant to Dr. T for retinal evaluation. Dr. T examined the claimant on September 13, 2002, and diagnosed peripapillary subretinal neovascular membrane in the right eye, part of which extends into the macula. The hearing officer found that the claimant "was not diagnosed with any external damage or abrasion to his eye . . . and no other damage to the right eye has been found other than the peripapillary subretinal neovascular membrane and infarct."

WAIVER

The hearing officer did not err in determining that the carrier waived the right to dispute compensability of the claimed injury. It is undisputed that the carrier received written notice of the claimant's eye injury on October 10, 2002, and that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on March 10, 2003. The carrier contends that it did not waive its right to dispute compensability of the claimant's peripapillary subretinal neovascular membrane in the right eye, asserting that this condition presented an extent-of-injury issue, not a waiver issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. Notwithstanding, we have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed

injury issue as an “extent issue” and thereby avoid the mandates of Section 409.021. See Texas Workers’ Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers’ Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers’ Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers’ Compensation Commission Appeal No. 022183, decided October 9, 2002. The carrier asserts that it accepted a minor abrasion to the eye by not contesting such an injury after receiving written notice of an injury on October 10, 2002, and that it is properly disputing the issue of whether the eye injury extends to the diagnosed condition. This position fails for two reasons. First, in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In Texas Workers’ Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated that “Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability.” In this case, the carrier’s TWCC-21 contesting compensability was not filed with the Commission within seven days after it received written notice of the injury, and in the absence of any other evidence showing compliance with Downs, the carrier has waived the right to dispute compensability. Second, the evidence shows and the hearing officer found that the primary claimed injury was peripapillary subretinal neovascular membrane and infarct in the right eye, as identified in medical records dated September 12, 13, and 27, 2002, and that this was the only diagnosis in the records. The claimant was not diagnosed with any external damage or abrasion to his eye. The hearing officer determined that the carrier could have, in the exercise of reasonable diligence, obtained the claimant’s diagnosis in time to dispute the compensability of the claimed injury in accordance with Section 409.021. The carrier failed to do this. Accordingly, the hearing officer properly determined that the carrier waived its right to dispute the claimant’s peripapillary subretinal neovascular membrane and infarct in the right eye injury, and that such injury is compensable.

INJURY AND DISABILITY

The hearing officer did not err in determining that the waived, and therefore, compensable, injury of _____, includes peripapillary subretinal neovascular membrane and infarct in the right eye, and that the claimant had disability beginning December 4, 2002, and continuing through July 28, 2003. The determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer’s determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer, as reformed.

The true corporate name of the insurance carrier is **FIDELITY AND GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge